U.S. Department of Labor

Board of Alien Labor Certification Appeals
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DATE: August 18, 2000

CASE NO: 1999-INA-310

In the Matter of

SPEC RESEARCH INC.
Employer

on behalf of

DONGMING LI
Alien

Appearances: Zhongping Liang, Esq.,
For Employer and Alien

Certifying Officer: Richard E. Panati, Region III

Before: Burke, Huddleston, and Jarvis
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from SPEC Research Inc.'s ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at

the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On March 16, 1998, the Employer filed a Form ETA 750 Application for Alien Employment Certification with the Virginia Employment Commission on behalf of the Alien, Dongming Li. (AF 31-32). The job opportunity was listed as "Business/Management Analyst". (AF 31). The job duties were described as follows:

> Analyze marketing activities and products development in Asia; Develop marketing strategy and literature, draft business operation procedures and systems; Conduct operational effective reviews to ensure implementation of business plan; Develop and maintain market information data flow; and investigate supply sources and requirements.

(Id.). The stated job requirements for the position, as set forth on the application, included a Masters in Business or a related area. Other special Requirements were listed as "good knowledge of Asian cultures, strong analytical and communication skills, and Chinese language proficiency are required. Strong PC skills [preferred]." (Id.).

From April 26, 1999, through May 15, 1999, the Virginia Employment Commission transmitted resumes of 24 U.S. applicants to the Employer. The Employer's Results of Recruitment Report, dated June 10, 1999, indicated that none of the applicants was qualified. (AF 38-45). The file was transmitted to the CO.

The CO issued a Notice of Findings ("NOF") on July 8, 1999, proposing to deny the certification because the Employer rejected two applicants for non lawful job-related reasons in violation of Section 656.21(b)(6), and the job opportunity was not clearly open to any qualified U.S. worker in violation of Section 656.20(c)(8). (AF 15-16). The CO found that applicants Taylor and Fair were both qualified for

the position offered to the Alien based on the information contained in their resumes (AF 16). Applicant Taylor was rejected for not having a degree in Business, for lacking skills in performing job duties which are specified in the job duty description, and for lacking industry knowledge. (AF 42). The CO found that applicant Taylor has a Ph.D. and a Masters in Economics which is a business related degree. (AF 16). The CO also noted that the applicant is fluent in the Chinese language and has a strong work history in marketing. The CO found that Employer did not require work experience and therefore may not reject an applicant for lack of work experience. (Id.). Applicant Fair was rejected for not being proficient in the Chinese language. (AF 40). The CO found that applicant Fair has an MBA and that her background strongly indicates that she can speak more than basic Chinese. (AF 16). The CO found that Employer's rejection of these applicants in favor of the Alien cannot be regarded as arising from lawful job-related reasons. (Id.). The CO instructed the Employer to provide documentary evidence that U.S. workers are not able, willing, qualified or available for this job opportunity. (Id.).

The Employer submitted its rebuttal on August 3, 1999, and provided the following information. (AF 8-14). The Employer asserted that during the interview with applicant Fair, a routine language test was administered to evaluate her actual ability and proficiency of the Chinese language. Applicant Fair failed to pass this basic level test as she failed to demonstrate her Chinese verbal communication skills and proficiency in the Chinese language. (AF 11-12). With regard to the rejection of applicant Taylor, Employer argued that "Ms. Taylor has strong credentials as she has [a] PhD and MA in Economics. **However, Ms. Taylor is not able to speak Mandarin Chinese.** She speaks **Hokkien (Minnan) dialect. She also stated that she has great difficulties writing and reading Chinese**." (AF 12) (emphasis in original). Employer explained the differences between Mandarin Chinese and southern local dialects and asserted that because of applicant Taylor's lack of Chinese communication skills, Employer withheld the job offer. In addition, Employer asserted that during the interview, applicant Taylor "expressed that she was only interested in doing consulting and working with projects dealing with Singapore, and not in China, Taiwan or other area[s]." (AF 13). Employer explained that its business activities are heavily involved in China and Taiwan and that an analyst must be able to work closely with our oversea partners and factories to supervise the quality and development of such products. (Id.).

The CO issued a Final Determination on August 11, 1999, denying certification. (AF 5-7). The CO noted that in rebuttal, Employer asserted that the rejection of the two U.S. applicants was job-related because neither applicant possessed fluency in the Chinese language. The CO accepted the rebuttal response with regard to applicant Fair, as this was consistent with the initial explanation of why applicant Fair was rejected. With regard to applicant Taylor, the CO noted that Employer's rebuttal indicated that the applicant was unable to speak Mandarin Chinese and was only interested in consulting with projects in Singapore, not China. The CO found that Employer's initial explanations as to why applicant Taylor was rejected, as contained in its Results of Recruitment Report and in its interview notes, made no mention of the applicant's inability to speak Mandarin Chinese or of the applicant's job preferences. The CO noted that Employer's original rejection of this applicant was based on the following:

> The applicant has a strong background in Economics, but not in Business which this job required. Our interview indicated that the applicant lacks skills in performing job duties which are specified in the job duty description. Moreover, the applicant lacks industry knowledge which is considered essential in performing the job duties. We therefore decided not to extend our offer.

(AF 6). The CO found this reason for rejection to be highly specific and that it is "implausible that such a detailed explanation would fail to include such basic information as lack of Chinese language ability or the applicant's disinterest in performing the job as described." (Id.). The CO found that Employer failed to establish that applicant Taylor was unqualified.

On September 12, 1999, Employer filed a timely Request for Review. (AF 1-4). The file was then forwarded to the Board of Alien Labor Certification Appeals ("BALCA") for review.

Discussion

Section 656.21(b)(6) states that an employer is required to document that U.S. applicants were rejected solely for job related reasons. Section 656.20(c)(8) requires that the job opportunity must have been open to any qualified U.S. worker. In general, an applicant is considered qualified for a job if he or she meets the minimum requirements specified for that job in the labor certification application. *United Parcel Service,* 1990-INA-90 (Mar. 28, 1991). An employer unlawfully rejects a U.S. worker who satisfies the minimum requirements specified on the ETA 750A and in the advertisement for the position. *American Café,* 1990-INA-26 (Jan. 24, 1991). Section 656.24(b)(2)(ii) provides that the Certifying Officer shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers. The principal issue presented here is whether applicant Taylor was rejected for a lawful job-related reason.

The Employer conducted recruitment for the position offered for labor certification during April 1999. (AF 38). In a letter sent to the Virginia Employment Commission dated June 10, 1999, the Employer stated that it did not hire applicant Taylor because her background was in Economics, not in Business. In addition, Employer also stated that the applicant was rejected because she lacked the skills in performing the duties of the job and she lacked the industry knowledge. (AF 42).

In the NOF, the CO found Employer's reasons for rejection, lack of business background, lack of skills in performing job duties and lack of industry knowledge, unlawful. The CO noted that Employer's requirements for the position, as stated in the 750A, included a Masters in Business or a related field and did not include any experience in the job offered. (AF 16). The CO found that Employer had not established that applicant Taylor would be unable to perform the position or that her qualifications do not meet the stated job requirements. (Id.). In its rebuttal, Employer did not address the CO's finding

that applicant Taylor was qualified based on her degree and background but raised new reasons for rejection, stating that the applicant was not proficient in Mandarin Chinese and that the applicant was not interested in performing the job as described. The CO denied certification based on the finding that Employer did not respond to the finding in the NOF but rather provided new reasons for rejection of the applicant that were inconsistent with the Employer's Results of Recruitment Report and Employer's interview notes.

Employer argues on appeal that applicant Taylor was rejected for the initial reasons stated in its Results of Recruitment Report and for the new reasons stated in its rebuttal. Employer explained that its rebuttal argument was in response to the CO's finding that the applicant was fluent in Chinese. (AF 3). In addition, Employer asserted that it did not initially emphasize applicant Taylor's lack of language skills because of "our belief that Ms. Taylor's lack of industry knowledge is sufficient justification for us not to extend a job offer. We were also concerned that her lack of Chinese language skills may be rejected as a lawful reason because Hokkien (Minnan) dialect...is nevertheless a dialect in China and may be regarded as Chinese by the Labor Department." (AF 4).

In its rebuttal to the NOF, the Employer did not refer to its earlier determination as to why applicant Taylor was not qualified for the job opportunity, but set forth two new reasons for rejecting this applicant. The Board has held that a CO is not required to investigate the legitimacy of a totally independent reason for rejection offered by the employer for the first time in response to the NOF. *Foothill International, Inc.*, 1987-INA-637 (Jan. 20, 1988); *see also American Café, supra*. We agree with the CO that this rebuttal was not responsive to the NOF. Furthermore, we also agree with the CO that Employer's argument on rebuttal was inconsistent with its previous assertions. In its Results of Recruitment Report, Employer went into detail about its reasons for rejection and failed to address either of the assertions made in its rebuttal. In addition, upon review of Employer's interview notes, there is no mention that applicant Taylor is not proficient in Chinese. On the Interview Evaluation Form that Employer presumably filled out during the interview, Employer has written "Not Eval." under the heading "Language Skill." (AF 21). This implies that the applicant's proficiency in the Chinese language was not even evaluated. This is inconsistent with Employer's argument on appeal that applicant Taylor admitted during her interview that she could barely read or write Chinese. (AF 4).

The Employer has failed to provide either evidence or argument which is responsive to the NOF. Since the Employer has not established a lawful, job related reason for rejecting this applicant, the denial of labor certification will be affirmed.

Order

The Certifying Officer's denial of labor certification is affirmed.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge

San Francisco, California